

THE FCC MAY ADOPT RULES TO LIMIT THE UNAUTHORIZED REDISTRIBUTION OF DIGITAL BROADCAST CONTENT

Through the Communications Act, Congress has given the Commission authority over “all interstate and foreign communication by wire or radio,” including broadcasting, and over “all persons engaged within the United States in such communication.” 47 U.S.C. § 152(a). In exercising this authority, the Commission is charged with various mandates, including (1) preserving the benefits of free over-the-air local broadcast television, and (2) promoting fair competition in the market for television programming.¹

Separately, and more recently, Congress authorized the development of a nationwide system of over-the-air digital broadcast television. In the Telecommunications Act of 1996, Congress specifically tasked the Commission with licensing digital broadcast television stations, adopting technical requirements to assure the quality of the digital broadcast signal, and “prescribing such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.” 47 U.S.C. § 336(a), (b)(4), (b)(5).

In carrying out these established mandates, the Commission undeniably has the ability, as does any administrative agency, to undertake all other activities reasonably necessary to advance their purpose.² Indeed, the Communications Act is unique in that it *expressly* confers upon the Commission the authority to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i). It separately provides that the Commission

¹ See *Turner Broadcasting System, Inc. v. Fed. Communications Comm’n*, 520 U.S. 180 (1997) (quoting *Turner Broadcasting System, Inc. v. Fed. Communications Comm’n*, 512 U.S. at 622, 662 (1994)).

² See *Interstate Commerce Commission v. American Trucking Associations*, 467 U.S. 354, 356, 364-70 (1984) (upholding ICC action because it was “closely and directly related to the [ICC’s] express statutory powers and [was] designed to achieve” statutory objectives); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 9-13 (1980) (upholding agency regulation because it furthered the overriding purpose of OSHA even though not expressly authorized by statute); *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 633, 651-56 (1978) (ICC has authority ancillary to statutory suspension power to establish maximum interim rates and refund provisions); *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 513-15 (1976) (upholding ICC accounting order as “a legitimate, reasonable, and direct adjunct to the Commission’s explicit statutory power to suspend rates pending investigation”); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 774-77 (1968) (upholding Federal Power Commission’s jurisdiction over prices charged by field producers pursuant to its statutory authority to regulate interstate transportation); *Tate & Lyle, Inc. v. C.I.R.*, 87 F.3d 99, 104 (3d Cir. 1996) (“Inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress”).

may, in the broadcast context, “[m]ake such rules and regulations and prescribe such restrictions . . . as may be necessary to carry out the provisions of this Act . . .” 47 U.S.C. § 303(r). In applying these provisions, the Supreme Court has held that the Commission has authority over matters “reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.”³

In *Southwestern Cable*, the Supreme Court upheld the Commission’s promulgation of rules imposing behavioral constraints on cable television system operators in the absence of an express statutory grant of jurisdiction. The Commission acted on the basis of its concern that the importation of distant signals by cable operators – as to which the Commission concededly did not have an express grant of jurisdiction – into the service areas of local television stations – as to which it did – could “destroy or seriously degrade the service offered by a television broadcaster, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.”⁴ The Supreme Court affirmed the Commission’s assumption of jurisdiction on the ground, among others, that the exercise of “regulatory authority over [cable television] is *imperative* if [the Commission] is to perform with appropriate effectiveness certain of its other responsibilities” – *i.e.*, the preservation of a nationwide system of free, over-the-air broadcast television stations.⁵

Since *Southwestern Cable*, the Commission has invoked its “ancillary jurisdiction” to promulgate regulations necessary to carry out several directives of the Communications Act. Most recently, the Commission has exercised its ancillary jurisdiction to extend over-the-air reception device protections to certain antennae, and to require voicemail and interactive menu service providers to make their services accessible to persons with disabilities.⁶

There is no dispute that the speedy development of free, over-the-air digital broadcast television is an important communications policy

³ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). *See also U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668-70 (1972) (upholding FCC’s program origination rule under ancillary jurisdiction doctrine); *CBS, Inc. v. Fed. Communications Comm’n*, 629 F.2d 1, 26-27 (D.C. Cir. 1980) (alternatively holding that FCC’s application of Section 312(a)(7) to networks was an exercise of power reasonably ancillary to the effective enforcement of a statutory provision).

⁴ 392 U.S. at 175 (citation omitted).

⁵ *Id.* at 173 (emphasis added).

⁶ *See In re Promotion of Competitive Networks*, 15 FCC Red 22983, 23028-29 (2000); *In re Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Red 6417 (1999).

goal. Indeed, no party has disputed that the Commission may rely on its ancillary jurisdiction over broadcasting to promulgate regulations that advance the Congressional objectives embodied in Section 336, and, more broadly, Title III of the Communications Act.⁷ At issue, then, is whether there is a valid public interest rationale for the Commission to assert its jurisdiction to prevent the unauthorized redistribution of digital broadcast television programming.

The multiple justifications for limitations on the unauthorized redistribution of digital broadcast content were amply described in our comments and reply comments and will not be repeated here.⁸ Suffice it to say that the record in this proceeding demonstrates why the threat of wide-scale piracy, if not addressed, will limit the availability of high-value programming over digital broadcast television, seriously threatening, in turn, the success and viability of the digital transition.

Opponents of Commission action argue that while the Commission may have “authority to require [creators of digital broadcast media to embed] some sort of a broadcast flag . . . in the DTV signal,” the Communications Act does not authorize the Commission to require television receivers to be capable of reading the flag.⁹ But that conceded authority is meaningless if the Commission cannot also mandate the implementation of a corresponding technology capable of reading the flag embedded in the digital broadcast signal. In an analogous context, the Commission recently dismissed as “absurd” equipment manufacturers’ contentions that, under the All Channel Receiver Act, the Commission could require that television receivers be capable of receiving a digital signal, but not that they be able to display it in a viewable format.¹⁰

A few commenters in this proceeding also contend that the D.C. Circuit’s recent decision in *Motion Picture Ass’n of America v. Fed. Communications Comm’n*, 309 F.3d 796 (D.C. Cir. 2002), bars the

⁷ See, e.g., Comments of Public Knowledge/Consumers Union at 24.

⁸ See Comments of the Motion Picture Association of America, Inc., et al., MB Docket No. 02-230, December 6, 2003 (“Joint Comments”); Reply Comments of the Motion Picture Association of America, Inc., et al., MB Docket No. 02-230, February 18, 2003 (“Joint Reply Comments”).

⁹ See Comments of Public Knowledge/Consumers Union at 24.

¹⁰ See *Review of the Commissions Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15987, ¶ 29 (2002) (requiring equipment manufacturers to include digital tuner sections in certain television receivers on a phased-in schedule beginning in 2004).

Commission from adopting regulations pursuant to its Title I authority.¹¹ But, the court reviewed the Commission's rules in that case under a strict scrutiny standard because they mandated specific content; moreover, the Commission's rules contradicted an express Congressional directive.¹² The rules at issue here are necessary to protect the integrity of broadcast digital transmissions; they will not affect the content embodied within those transmissions.¹³

The Commission previously has adopted rules affecting television reception equipment, both with and without an express statutory mandate; there is no reason it should not do so here.¹⁴ One commenter's contention that the Commission has never imposed requirements on the manufacture of television reception equipment in the absence of an express statutory delegation of authority is incorrect.¹⁵ The Commission has, for example, enacted rules requiring television sets to receive and display color transmissions even in the absence of an express mandate from the Congress.¹⁶

Indeed, that the Commission exercised its authority to regulate broadcast reception equipment during the transition to color television is significant. The Commission has stated that digital television "promises to be one of the most significant developments in television technology since the advent of color television in the 1950s."¹⁷ It is precisely in situations such as these – where the public interest in the continued integrity of a nationwide system of free, over the air television must be reconciled with rapid and unpredictable technological developments – that the Commission's ancillary jurisdiction is appropriately invoked.

¹¹ See Comments of Public Knowledge/Consumers Union at 24-25; Comments of IT Coalition at 8, n.19.

¹² 309 F.3d at 802 (holding that "when coupled with the absence of authority under § 1 . . . [of the Communications Act], § 713 clearly supports the conclusion that the FCC is barred from mandating video description).

¹³ See *Motion Picture Ass'n of America*, 309 F.3d at 804-805 (distinguishing the holdings in *Southwestern Cable* and other cases on the grounds that they "do not relate to program content"). See also Joint Reply Comments at 38-39; Joint Comments at 39.

¹⁴ See Joint Reply Comments at n.14; Joint Comments at 31.

¹⁵ See Comments of Public Knowledge/Consumers Union at 26.

¹⁶ See *Amendment to the Commission's Rules Governing Color Television Transmissions*, 41 FCC 658 (1953).

¹⁷ See FCC, Office of Engineering and Technology, "Digital Television Consumer Information," available at www.fcc.gov/Bureaus/Engineering_Technology/Factsheets/dtv9811.html (Nov. 1998).

When Congress authorized the Commission to implement a nationwide system of over-the-air digital broadcast television in 1996, no one could have predicted how digital television would develop and what regulations would be required for it to flourish. The devil would be in the details, and Congress left them to the Commission. The Communications Act was intended to be a “supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”¹⁸ Indeed, the Supreme Court in *Southwestern Cable* noted that because the Commission has “unified jurisdiction’ and ‘regulatory power’ over all forms of . . . communication,” it must have “broad authority” to fulfill its regulatory responsibilities.¹⁹ If the mandate of Section 336 that the Commission implement a nationwide system of over-the-air digital broadcast television is to have any meaning, the Commission must possess the authority to promulgate regulations that will enable it to achieve this objective.²⁰

Some commenters suggest that the Commission should take a “wait and see” approach – deferring action until the unauthorized redistribution of broadcast digital programming becomes widespread (and, by then, uncontainable).²¹ This is precisely backwards. Suggesting that the Commission should wait until an anticipated harm is manifest – that is, until it is too late – before acting to prevent or avert that harm is absurd. Such a view has been soundly rejected in similar contexts by reviewing courts, which have concluded – logically – that the Commission, as the expert agency, may assess, and, if indicated, act to prevent potential harms *before* they occur.²²

¹⁸ *Fed. Communications Comm’n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

¹⁹ *Southwestern Cable*, 393 U.S. at 167-168 (quoting the legislative history of the Communications Act) (footnotes omitted).

²⁰ Notably, the advanced television and public interest mandates embodied in Section 336 apply exclusively to free, over-the-air television broadcast stations, not conditional access subscription-based systems. Thus, while Section 336 provides a basis (either standing alone or in conjunction with the Commission’s “ancillary jurisdiction” over broadcasting) for limiting the unauthorized redistribution of broadcast digital content, it does not confer jurisdiction on the Commission to adopt encoding rules, prohibit limitations of outputs, or prohibit image constraint, as some have argued in the “Plug-and-Play” proceeding. *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, at al.*, CS Docket No. 97-80, Reply Comments of the Motion Picture Association of America, filed April 28, 2003, at 9-10 (citing Comments of Comcast at 13-14; Comments of the Consumer Electronics Industry at 4; Comments of the National Cable & Telecommunications Ass’n at 17).

²¹ *See* Comments of Public Knowledge/Consumers Union at 8-9.

²² *See, e.g., GTE Service Corp. v. Fed. Communications Comm’n*, 474 F.2d 724, 731-32 (2d Cir. 1973); *See North Am. Telecomms. Ass’n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) (upholding Commission order requiring regional companies to submit capitalization

The Commission possesses ample tools – the mandate of Section 336 and the jurisdiction over matters that are ancillary to its authority over broadcasting – to adopt regulations that would limit the unauthorized redistribution of digital broadcast content. The Commission should embrace these tools in order to nurture and preserve the availability of high-quality, free, over-the-air broadcasting through the digital transition.

plans to prevent cross-subsidizations); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2nd Cir. 1973) (regulation of data processing activities of common carriers justified under FCC's broad authority because they "pose a threat to efficient public communications services at reasonable prices"). *Cf. FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953) (Commission must warrant only that there "is ground for reasonable expectation that competition may have some beneficial effect"); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945) ("Forecasts as to the future are necessary" to the ICC's decisions); *Telocator Network of Am. v. FCC*, 691 F.2d 525, 538, 542-45 (D.C. Cir. 1982) (sustaining spectrum allocation plan as to which FCC rationally concluded competition "predictably would further the public interest in larger, more economical, and more effective service"), *cert. denied*, *National Ass'n of Radiotelephone Sys. v. FCC*, 425 U.S. 992 (1976); *Washington Utils. & Transp. Comm'n*, 513 F.2d 1142, 1160 (9th Cir. 1975) (FCC planning to satisfy "future public needs" must "necessarily rest . . . upon the acceptance of uncertain forecasts of future events."), *overruled on other grounds*, *State of Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990)